



COMMONWEALTH of VIRGINIA

DEPARTMENT OF ENVIRONMENTAL QUALITY VALLEY REGIONAL OFFICE

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STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO OLD TRAIL CREEKSIDE IV, LLC FOR OLD TRAIL CREEKSIDE PHASE III Permit No. WP4-13-0854

SECTION A: Purpose

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and Old Trail Creekside IV, LLC, regarding Old Trail Creekside Phase III for the purpose of resolving certain violations of State Water Control Law, the applicable Permit, and regulations.

SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
2. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
3. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.

4. "Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of a pollutant or combination of pollutants, to state waters or waters of the contiguous zone or ocean other than a discharge from a vessel or other floating craft when being used as a means of transportation.
5. "Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.
6. "Fill" means replacing portions of surface water with upland, or changing the bottom elevation of surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris. 9 VAC 25-210-10.
7. "Fill Material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose. 9 VAC 25-210-10.
8. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
9. "Old Trail" means Old Trail Creekside IV, LLC, a limited liability company authorized to do business in Virginia, and its members, affiliates, partners, and subsidiaries. Old Trail is a "person" within the meaning of Va. Code § 62.1-44.3.
10. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
11. "Permit" or "Virginia Water Protection Permit" means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344.
12. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.
13. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c)

contributing to the contravention of standards of water quality duly established by the board, are "pollution." Va. Code § 62.1-44.3; 9 VAC 25-210-10.

14. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
15. "Site" means the Old Trail Creekside Phase III development site located at 6125 Jarmans Gap Road in Crozet, within Albemarle County, Virginia.
16. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
17. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
18. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
19. "Va. Code" means the Code of Virginia (1950), as amended.
20. "VAC" means the Virginia Administrative Code.
21. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

SECTION C: Findings of Fact and Conclusions of Law

1. Old Trail Creekside IV, LLC (Old Trail) is subject to a Virginia Water Protection General Permit (Permit) issued by DEQ on September 17, 2013. The Permit authorizes Old Trail to permanently impact 0.06 acre of palustrine emergent (PEM) wetlands and 175 linear feet of stream channel associated with the Old Trail Creekside Phase III development site (Site). Specifically, the authorized stream impacts are associated with the installation of a double line of 42" culverts in the unnamed tributary to Lickinghole Creek for the Birchwood Hill Road extension; the authorized PEM wetlands impacts are associated with the construction of Mill Stone Lane and the development of Lot #61.

These permitted impact areas are denoted in the Joint Permit Application (JPA) dated May 29, 2013¹.

2. On June 21, 2016, DEQ staff performed an inspection of the Site at 6125 Jarmans Gap Road in Crozet, Virginia and observed the following:
 - a. At the Birchwood Hill Road extension, 4 to 8 inches of sediment that had eroded from the Site had filled in and clogged approximately 800 linear feet of the previously free-flowing stream. An additional 30 linear feet of stream channel impacts were observed due to the excavation and installation of riprap at the inlet of the new 42" culverts. In addition, a sediment trap had been installed in the adjacent palustrine forested (PFO) wetland resulting in a loss of 0.01 acre of the wetland. None of the aforementioned impacts were indicated in the JPA or were authorized under the Permit.

Va. Code § 62.1-44.15:20(A) states: "Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to conduct the following in a wetland: New activities to cause draining that significantly alters or degrades existing wetland acreage or functions; Filling or dumping; ... or New activities that cause significant alteration or degradation of existing wetland acreage or functions; or Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board."

9 VAC 25-210-50(A) states: "Except in compliance with a VWP permit, unless the activity is otherwise exempted or excluded, no person shall...fill or discharge any pollutant into, or adjacent to surface waters,...otherwise alter the physical, chemical or biological properties of surface waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses."

- b. The two 42" culverts at the Birchwood Hill Road Extension crossing were not adequately countersunk.

Permit Part I.C.2. states: "No activity may substantially disrupt the movement of aquatic life indigenous to the water body, including those species which normally migrate through the area, unless the primary purpose of the activity is to impound water. Culverts placed in streams must be installed to maintain low flow conditions. The requirement to countersink does not apply to extensions or maintenance of existing culverts that are not countersunk, floodplain culverts

¹ Following receipt of additional information through July 2013, the JPA was deemed technically complete on August 7, 2013.

being placed above ordinary high water, culverts being placed on bedrock, or culverts required to be placed on slopes 5.0% or greater. No activity may cause more than minimal adverse effect on navigation. Furthermore the activity must not impede the passage of normal or expected high flows and the structure or discharge must withstand expected high flows.”

- c. DEQ staff observed improperly maintained silt fence and sediment traps at the Site resulting in measurable sedimentation in the stream channel located downslope, as described above.

Permit Part I.C.5 states: “Erosion and sedimentation controls shall be designed in accordance with the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992, or for mining activities covered by this general permit, the standards issued by the Virginia Department of Mines, Minerals and Energy that are effective as those in the Virginia Erosion and Sediment Control Handbook, Third Edition, 1992. These controls shall be placed prior to clearing and grading and maintained in good working order to minimize impacts to state waters. These controls shall remain in place until the area is stabilized and shall then be removed.”

- d. No flagging or marking around designed nonimpacted surface waters were observed at the Site.

Permit Part I.C.10. states: “All nonimpacted surface waters and compensatory mitigation areas within 50 feet of permitted activities and within the project or right-of-way limits shall be clearly flagged or marked for the life of the construction activity at that location to preclude unauthorized disturbances to these surface waters and compensatory mitigation areas during construction. The permittee shall notify contractors that no activities are to occur in these marked surface waters.”

- 3. On August 11, 2016, DEQ issued NOV No. 16-08-VRO-001 to Old Trail for the violations of State Water Control Law, Regulations, and the Permit.
- 4. On August 25, 2016, DEQ staff met at the Site with a representative of Old Trail, a representative of Collins Engineering, a representative of Digs Inc., and a representative of Albemarle County. DEQ requested that Old Trail submit a plan and schedule for corrective action that included the following:
 - a. Quantify and document all permanent wetland impacts and all permanent stream impacts that occurred at the Birchwood Road extension culvert crossing that are in excess of those wetland and stream impacts authorized under the Permit.
 - b. Remove excess riprap at the culvert crossing and shape the riprap to create a low-flow channel.

- c. Utilize hand tools to remove sedimentation for approximately 800 linear feet of stream channel located immediately downstream of the culvert crossing at the Birchwood Hill Road extension.
 - d. Provide timely photographic documentation of the riprap removal and shaping, and in-stream sediment removal.
5. On November 30, 2016, DEQ received an email from Digs, Inc. on behalf of Old Trail which included photographs documenting the hand removal of sedimentation from the unnamed tributary. Additionally, Digs, Inc. indicated that the riprap at the culverts was reshaped to facilitate low flows and that the work was completed in September 2016.
 6. Based on the results of the June 21, 2016 inspection and the August 25, 2016 meeting, the Board concludes that Old Trail has violated Permit Part I.C.2, Permit Part I.C.5, Permit Part I.C.10, Va. Code § 62.1-44.15:20(A), and 9 VAC 25-210-50(A) as described in paragraphs C(2) through C(4), above.

SECTION D: Agreement and Order

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders Old Trail and Old Trail agrees to:

1. Pay a civil charge of \$19,500.00 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control
Department of Environmental Quality
Post Office Box 1104
Richmond, Virginia 23218

Old Trail shall include its Federal Employer Identification Number (FEIN) with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, Old Trail shall be liable for attorneys' fees of 30% of the amount outstanding.

SECTION E: Administrative Provisions

1. The Board may modify, rewrite, or amend this Order with the consent of Old Trail for good cause shown by Old Trail, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.

2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and in NOV No. 15-10-VRO-001 dated October 28, 2015. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Old Trail admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. Old Trail consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Old Trail declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.
6. Failure by Old Trail to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Old Trail shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. Old Trail shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Old Trail shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
 - a. the reasons for the delay or noncompliance;
 - b. the projected duration of any such delay or noncompliance;

- c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
- d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

- 9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
- 10. This Order shall become effective upon execution by both the Director or his designee and Old Trail. Nevertheless, Old Trail agrees to be bound by any compliance date which precedes the effective date of this Order.
- 11. This Order shall continue in effect until:
 - a. the Director or his designee terminates the Order after Old Trail has completed all of the requirements of the Order;
 - b. Old Trail petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
 - c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Old Trail.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Old Trail from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

- 12. Any plans, reports, schedules or specifications attached hereto or submitted by Old Trail and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
- 13. The undersigned representative of Old Trail certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind Old Trail to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of Old Trail.
- 14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no

representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.

15. By its signature below, Old Trail voluntarily agrees to the issuance of this Order.

And it is so ORDERED this _____ day of _____, 2017

Amy T. Owens, Regional Director
Department of Environmental Quality

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Old Trail Creekside IV, LLC voluntarily agrees to the issuance of this Order.

Date: 3/15/17 By: [Signature], manager
(Person) (Title)
Old Trail Creekside IV, LLC

Commonwealth of Virginia
City/County of CHARLOTTESVILLE

The foregoing document was signed and acknowledged before me this 15TH day of MARCH, 2017, by JUSTIN T. BEIGHTS who is MANAGER of Old Trail Creekside IV, LLC, on behalf of the company.

[Signature]
Notary Public

101844
Registration No.

My commission expires: 7/31/2018

Notary seal:

